ORIGINAL

NO. 84-6811

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

WARREN McCLESKEY,

Petitioner,

v.

RALPH M. KEMP, SUPERINTENDENT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTIONS PRESENTED

I.

Did the Eleventh Circuit Court of Appeals properly conclude that the Petitioner had failed to show that the death penalty in Georgia was applied in an arbitrary or capricious manner?

II.

Did the Eleventh Circuit Court of Appeals properly conclude that Petitioner had failed to prove racial discrimination in Georgia's capital sentencing system?

III.

Did the Eleventh Circuit Court of Appeals properly conclude that there was no violation of Giglio v. United States or that any such violation was harmless?

IV.

Did the Eleventh Circuit Court of Appeals properly conclude that the trial court's instruction on intent was, at most, harmless error?

V.

Did the Eleventh Circuit Court of Appeals properly conclude that Petitioner was not entitled to relief on his challenge to the "death-qualification" of the trial jury?

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PART ONE

STATEMENT OF THE CASE

On June 13, 1978, the grand jury of Fulton County, Georgia returned a three count indictment against the Petitioner, Warren McCleskey and his three co-indictees, David Burney, Bernard Dupree and Ben Wright, Jr., charging said individuals with the offense of murder and two counts of armed robbery. The Petitioner was tried separately beginning on October 9, 1978, and was found guilty on all three counts. The jury imposed the death penalty after a separate sentencing proceeding on the murder charge, finding that: (1) the offense of murder was committed while the Petitioner was engaged in the commission of another capital felony, and (2) the offense of murder was committed against a peace officer, corrections employee or fireman while engaged in the performance of his official duties. See O.C.G.A. §§ 17-10-30(b)(2) and (b)(8); Ga. Code Ann. §§ 27-2534.1(b)(2) and (b)(8). Consecutive life sentences were imposed on the two counts of armed robbery.

The Petitioner appealed his convictions and sentences to the Supreme Court of Georgia which court affirmed all convictions and sentences. A subsequent petition for a writ of certiorari was denied by this Court. McCleskey v. State, 245 Ga. 108, 263 S.E.2d 146, cert. denied, 449 U.S. 891 (1980).

On January 5, 1981, the Petitioner filed a petition for habeas corpus relief in the Superior Court of Butts County, Georgia. An evidentiary hearing was held by that court on January 30, 1981. The Superior Court of Butts County denied habeas corpus relief in an order dated April 8, 1981. The Supreme Court of Georgia denied the subsequent application for a certificate of probable cause to appeal on June 7, 1981. The ensuing petition for a writ of certiorari was denied by this Court on November 30, 1981.

On December 30, 1981, the Petitioner filed a petition for habeas corpus relief in the United States District Court for the Northern District of Georgia. Leave of court was granted for both parties to conduct discovery so that evidence could be obtained concerning a statistical challenge to the imposition of the death penalty in the State of Georgia. An evidentiary hearing was held during the month of August, 1983 and an additional hearing was held in October, 1983.

The district court entered an order on February 1, 1984. McCleskey v. Zant, 580 F.Supp. 338 (N.D.Ga. 1984). That court rejected all issues raised in the petition except for the alleged undisclosed deal with a witness. The court directed that habeas corpus relief be granted as to that issue and ordered that the conviction and sentence for malice murder be set aside, but still affirmed the conviction for armed robbery.

Both parties appealed the decision of the district court to the United States Court of Appeals for the Eleventh Circuit. On March 28, 1984, the Eleventh Circuit Court of Appeals directed that the instant case be heard initially by the court sitting en banc. On January 29, 1985, the en banc court issued

an opinion affirming all convictions and sentences. McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985) (en banc). Petitioner subsequently filed the instant petition for a writ of certiorari in this Court challenging the decision by the Eleventh Circuit Court of Appeals.

PART TWO

STATEMENT OF FACTS

The evidence presented at Petitioner's trial showed that on May 13, 1978, he and three co-defendants committed an armed robbery at the Dixie Furniture Store in Atlanta, Georgia. During the course of the robbery, the Petitioner entered the front of the store, while his three co-defendants entered from the back of the store. Petitioner was positively identified at trial as one of the participants in the robbery. (T. 231-232, 242, 250).[1]

Following the arrest of the Petitioner, he was taken to Atlanta, Georgia. On May 31, 1978, the Petitioner made a confession to the police in which he admitted his participation in the robbery, but denied that he shot Atlanta Police Officer Frank Schlatt. A Jackson v. Denno hearing was held at trial and the court determined that the confession was freely, intelligently and voluntarily made. (T. 426-505).

Petitioner's co-defendant, Ben Wright, testified at trial and related the details of the robbery and murder. Ben Wright testified that while he carried a sawed-off shotgun, the Petitioner carried a .38 caliber nickel-plated, white-handled pistol. (T. 654-656, 648-649). Wright testified that co-defendant Burney had a blue steel, snub-nosed .32 caliber pistol while Dupree had a blue steel .25 caliber pistol. (T. 649-651).

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[1] T. ___ will be used to refer to the transcript of Petitioner's trial in the Superior Court of Fulton County. S.H.T. ____ will be used to refer to the transcript of the state habeas corpus hearing in the Superior Court of Butts County, Georgia. F.H.T. ___ will be used to refer to the transcript of the evidentiary hearing held by the district court beginning on August 8, 1983. F.H.T. II ___ will be used to refer to the subsequent evidentiary hearing conducted in the district court.

The testimony revealed that while Dupree, Burney and Wright held several employees in the back of the store, the Petitioner was in the front. Employee Classie Barnwell activated a silent alarm, resulting in the arrival of Officer Schlatt. Shortly after Schlatt entered the front of the store, he was shot. After hearing two shots, Wright saw the Petitioner running out of the front of the store. Wright, Dupree and Burney ran out of the back. When they all arrived at the car, Petitioner stated that he shot the police officer. (T. 658-659).

Mr. Everett New and his wife were stopped in their automobile at a redlight near the Dixie Furniture Store. They saw Officer Schlatt arrive at the scene, draw his pistol and enter the store. Mr. New testified that approximately thirty seconds later he heard two shots and shortly thereafter saw a black man running out of the front door carrying a white handled pistol; however, he could not identify that individual. (T. 331-333).

Petitioner testified in his own behalf at trial and stated that he knew Ben Wright and the other co-defendants, but that he had not participated in the robbery. Petitioner relied on an alibi defense, stating that Wright had borrowed his car and that Petitioner had spent the day at his mother's house and at some apartments in Marietta playing cards. Petitioner named several people who had been present at these apartments, but did not present any of those persons to testify. (T. 811).

Petitioner denied that he made a statement to Lieutenant Perry that he had participated in the robbery and stated that he made a false statement to Detective Jowers because of the alleged evidence the police had against him (two witnesses who had identified him, the description of his car and a statement from David Burney), because of his prior convictions and because he did not have good alibi. (T. 823-824).

Petitioner was also identified at trial by two witnesses who had observed him take part in a prior similar robbery. Mr. Paul David Ross, manager of the Red Dot Grocery Store, had

previously identified the Petitioner from a set of color photographs. Ross also testified that during the course of the Red Dot robbery, his nickel-plated .38 revolver was stolen.

Ms. Dorothy Umberger also saw the Petitioner during the April 1, 1978, robbery of the Red Dot Grocery Store. She testified that she was ninety percent certain that the Petitioner was one of the men who had robbed her. She based her identification on viewing the Petitioner at the scene of the crime and also identified the Petitioner from a photographic display.

In rebuttal, the State presented the testimony of Arthur Keissling. This witness testified that he had seen the Petitioner during the robbery of Dot's Produce on March 28, 1978. His identification of the Petitioner was positive. (T. 887-889, 896).

The State also presented, in rebuttal, the testimony of Offie Gene Evans. Mr. Evans had been incarcerated in the Fulton County jail in a cell located near the Petitioner and Bernard Dupree. Evans related that the Petitioner had talked about the robbery while in custody and had admitted shooting Officer Schlatt. (T. 869-870).

Respondent will set forth further facts as necessary to address the issues raised in the instant petition.

PART THREE

REASONS FOR NOT GRANTING THE WRIT

I. THE ELEVENTH CIRCUIT COURT OF APPEALS PROPERLY CONCLUDED THAT THE PETITIONER FAILED TO SHOW THAT THE DEATH PENALTY WAS APPLIED IN EITHER AN ARBITRARY OR DISCRIMINATORY FASHION.

Petitioner has raised two different challenges to the Eleventh Circuit Court of Appeals' opinion in the instant case. Petitioner raises a claim based on an Eighth Amendment challenge, as well as a challenge under the Equal Protection Clause of the Fourteenth Amendment and asserts that the death penalty in Georgia should be found to be violative of either or both of these Constitutional provisions. Respondent submits that the Eleventh Circuit Court of Appeals and the district court properly rejected both challenges.

A. The Evidence Presented.

Before examining the law to be applied in the instant case, it is pertinent to review the evidence presented to the district court for its consideration. The district court's opinion sets forth a detailed statement of the scope of the studies presented, noting that two different studies were conducted on the criminal justice system in Georgia, that is, the Procedural Reform Study and the Charging and Sentencing Study. See McCleskey v. Zant, supra at 353. Petitioner presented his case primarily through the testimony of Professor David C. Baldus and Dr. George Woodworth. Petitioner also presented testimony from Edward Gates as well as an official from the State Board of Pardons and Paroles. The State offered the testimony of two expert witnesses, Dr. Joseph Katz and Dr. Roger Burford. Petitioner then called Professor Baldus and Dr. Woodworth in rebuttal and also presented testimony from Dr. Richard Berk.

The Eleventh Circuit Court of Appeals noted the following findings by the district court in which the district court specifically concluded that the Petitioner failed to make out a prima facie case of discrimination adn discounted the Baldus study based on the following rationale:

> The Court discounted the disparity shown by the Baldus study on the ground that the research (1) showed substantial flaws in the date base, as shown in tests revealing coding errors and mismatches between items on the Procedural Reform Study (PRS) and Comprehensive (sic) Sentencing Study (CSS) questionnaires; (2) lacked accuracy and showed flaws in the models, primarily because the models do not measure decisions based on knowledge available to decision-maker and only predicts outcomes in 50 percent of the cases; and (3) demonstrated multi-collinearity among model variables, showing interrelationship among variables and consequently distorting relationships, making interpretation difficult.

McCleskey v. Kemp, supra, 753 F.2d at 886. The Eleventh Circuit also acknowledged the district court found that the State had rebutted any prima facie case that may have been shown because the district court found that the results were not the product of good statistical methodology and that there were other explanations available for the results of the study. Id. The district court finally concluded that the Petitioner had failed to carry his burden of persuasion to show that the death penalty was being imposed on the basis of the race of the defendant as well. "Petitioner conceded that the study is incapable of demonstrating that he was singled out for

the death penalty because of the race of either himself or his victim, and, therefore, Petitioner failed to demonstrate that racial considerations caused him to receive the death penalty." Id.

In making its analysis, the Eleventh Circuit Court of Appeals assumed without deciding that the research was valid because it felt that there was no need to reach the question of whether the research was valid. The court did not conclude that the research or methodology was valid.

The Eleventh Circuit Court of Appeals observed the following with relation to the various studies:

> The Baldus study analyzed the imposition of sentence in homicide cases to determine the level of disparity attributable to race in the rate of the imposition of the death sentence. In the first study, Procedural Reform Study (PRS), the results revealed no race-of-defendant effects whatsoever, and the results were unclear at that stage as to race-of-victim effects.
>
> The second study, the Charging and Sentencing Study (CSS), consisted of a random stratified sample of all persons indicted for murder from 1973 through 1979. The study examined the cases from indictment through sentencing. The purpose of this study is to estimate racial effects that were the product of the combined effects of all decisions from the point of indictment to the point of the final death-sentencing decision, and to include strength of the evidence in the cases.

The study attempted to control for all of the factors which played into a capital crime system, such as aggravating circumstances, mitigating circumstances, strength of evidence, time period of imposition of sentence, geographical areas (urban/rural), and race of defendant and victim. The data collection for these studies was exceedingly complex, involving cumbersome data collection instruments, extensive field work by multiple data collectors and sophisticated computer coding, entry and data cleaning processes.

Baldus and Woodworth completed a multitude of statistical tests on the data consisting of regression analysis, indexing factor analysis, cross tabulation, and triangulation. The result showed a 6 % racial effect systemwide for white victim, black defendant cases with an increase to 20 % in the mid-range of cases. There was no suggestion that a uniform, institutional bias existed that adversely affected defendants in white victim cases in all circumstances, or a black defendant in all cases.

The object of the Baldus study in Fulton County, where McCleskey was convicted, was to determine whether the sentencing pattern disparities that were observed statewide with respect to race of the victim and race of defendant were pertinent to Fulton County, and whether the evidence concerning Fulton County shed any light on Warren

> McCleskey's death sentence as an aberrant death sentence, or whether racial considerations may have played a role in the disposition of this case.
>
> Because there were only ten cases involving police officer victims in Fulton County, statistical analysis could not be utilized effectively. Baldus conceded that it was difficult to draw any inference concerning the overall race effect in these cases because there had only been one death sentence. He concluded that based on the data there was only a possibility that a racial factor existed in McCleskey's case.

McCleskey v. Kemp, supra, 753 F.2d at 887 (emphasis in original).

Although the Eleventh Circuit Court of Appeals determined that it was not necessary to address the validity of the studies, the district court specifically concluded that the research was not valid to prove any of the allegations raised. Respondent presented a wealth of testimony challenging the accuracy of the data base as well as the statistical methodology utilized. Respondent challenged the format of some of the questionnaire items in which there was insufficient provision for accounting for numerous factors present in the case. Respondent also submitted that there were numerous unknowns in both studies present which would affect the accuracy of any statistical analysis utilized. Respondent showed that the questionnaires as utilized could not capture all nuances of every case based on the format of certain specific questions.

The Charging and Sentencing Study utilized records of the State Board of Pardons and Paroles, supplemented by information from the Bureau of Vital Statistics and some questionnaires

from lawyers and prosecutors. Information was also obtained from the State Department of Offender Rehabilitation. Emphasis was placed on the fact that there was a summary of the police investigative report prepared by parole officers utilized. The records actually show, however, that this police report appeared in only about twenty-five percent of the cases. Furthermore, the investigative summaries of the Pardons and Paroles Board were done after the conviction, thus, they did not take into account the information that was known to the decision-makers at the time any individual decision was made. Furthermore, the information available from the parole board files was summary in nature. The people gathering information had no way of knowing the prosecutor's attitude toward credibility of witnesses as well as many other subjective factors.

The district court also found, as shown by the Respondent, that some of the questionnaires were clearly miscoded. "Because of the degree of latitude allowed the coders in drawing inferences based on the data in the file, a recoding of the same case by the same coder at a time subsequent might produce a different coding. . . . Also, there would be differences in judgment among the coders." McCleskey v. Zant, supra at 357. The district court also noted the inconsistencies in the questionnaires relating to McCleskey's case and his co-defendant's cases.

Respondent also introduced evidence showing comparisons between the Procedural Reform Study and the Charging and Sentencing Study. Respondent did not attempt to show that one study or the other was correct, but simply noted that there were inconsistencies such that either one or the other of the studies had to be incorrect. There were some 361 cases appearing in both studies. Of the variables examined by Dr. Katz, there were mismatches found in the coding between the two studies in all but two of the variables. The district court noted, "Some of the mismatches were significant and occurred

within factors which were generally thought to be important in a determination of sentencing outcome." Id. One of the central problems with these factors is there is no way to ascertain which study contains the correct data, if either study actually does contain the correct data.

In the district court proceeding, there was much testimony about the proper method of utilizing the unknown information and the unknown items present in both studies. This was presented by Respondent to rebut Professor Baldus' claim that the information was complete and accurate in the studies. Professor Baldus indicated that unknowns were consistently recoded to have zero values in analyzing the data. Dr. Katz asserted on behalf of the Respondent that the only statistically accepted method of utilizing unknowns would be to discard any observation in which there was an unknown. As the accuracy and reliability of the data is critical in this type of study, the recoding of unknown values consistently to be zero, that is not present at all, is not a reliable procedure. This method of recoding merely assumes that if an item were unknown to the coder, then it did not exist and that the decision-maker had no information concerning this factor. This overlooks the fact that prosecutors may have information in their file that was unknown to the coders and that juries may have made assumptions from the evidence which the coder concluded represented an unknown. Although Professior Baldus testified that this coding of unknowns would not affect the outcome of his analysis, the district court speficically found that the experiments conducted did not support this conclusion. McCleskey v. Zant, supra at 359.

Another factor addressed by the Respondent which seriously affects the reliability and accuracy of the data base is the use of the "other" designation. Many questions in the questionnaires provided for a designation of "other" when the questionnaire did not specifically list the appropriate answer. New variables were not identified by Professor Baldus

to include this information in his study. Thus, this additional information was simply ignored in compiling the data base.

Another weakness shown on the questionnaire design for both studies was a direct result of the fact that many murders are committed by two or more co-perpetrators. The testimony before the district court was unclear as to the instructions given to the coders or the intent of Baldus in the coding of the co-perpetrator cases. The questionnaire items are not in sufficient detail to differentiate the role of particular defendants and the extent of the participation of each defendant in the individual aggravating circumstances. It is difficult to isolate defendants who played a minor role in the crime versus a defendant who was the prime mover or actual triggerman in the case. This could be of particular importance in cases involving fact situations like that addressed by this Court in Enmund v. Florida, 458 U.S. 782 (1982).

In examining the trustworthiness of the data base, the district court specifically found the following:

> After a consideration of the foregoing, the court is of the opinion that the data base has substantial flaws and that the petitioner has failed to establish by a preponderance of the evidence that it is essentially trustworthy. As demonstrated above, there are errors in coding the questionnaire for the case sub judice. This fact alone will invalidate several important premises of petitioner's experts. Further, there are large numbers of aggravating and mitigating circumstances data about which is unknown. Also, the researchers are without knowledge concerning the decision made by prosecutors to advance cases to a penalty

> trial in a significant number of instances. The court's purpose here is not to reiterate the deficiencies but to mention several of its concerns. It is a major premise of a statistical case that the data base numerically mirrors reality. If it does not in substantial degree mirror reality, any inferences empirically arrived at are untrustworthy.

McCleskey v. Zant, supra, 580 F.Supp. at 360. (Emphasis in original).

In relation to the findings by the district court, the Eleventh Circuit Court of Appeals made no findings as to to the validity of the study or the data base. Although Petitioner states on numerous occasions that the Eleventh Circuit assumed the validity of the study, the court obviously did so solely for the purposes of its analysis, but specifically did not address this claim. In making its analysis, the court stated, "we affirm the district court on the ground that, assuming the validity of the research, it would not support a decision that the Georgia law was being unconstitutionally applied, much less would it compel such a finding. . . ." McCleskey v. Kemp, supra, 753 F.2d at 886. The court later again stated that the court would "assume without deciding that the Baldus study is sufficient to show what it purports to reveal as to the application of the Georgia death penalty." Id. at 895. Finally, the court again stated that "it would seem that the statistical evidence presented here, assuming its validity, confirms rather than condemns the system." Id. at 899. All of these references clearly show the court was simply assuming for the purposes of analysis and argument that the study was valid. Nowhere in its opinion did the court specifically rule on the validity of the study. Thus, this Court is left with

the factual findings made by the district court which are entitled to be reviewed under the clear erroneous standard. Therefore, Respondent would initially submit that the findings by the district court that the study itself was invalid, that the data base contained inaccuracies and the statistical methodology was not proper are sufficient to justify the denial of certiorari in this case.

Respondent also challenged the accuracy of the models utilized by the Petitioner in the court below. Petitioner asserts that Respondent failed to present any substitute models, but such was not the burden placed on the Respondent in this type of proceeding. Furthermore, Respondent's position thoroughout this proceeding has been that a statistical analysis of this type is simply insufficient to make determinations as to subjective issues such as intent and motivation.

All models utilized by the Petitioner assumed that the information that was available to the persons gathering the data was also available to the decision-maker at the time the decisions were made. This assumption was without support in the record. Thus, any model that was produced from this data would have to be flawed because it does not measure decisions based on the knowledge of the individual decision-maker. The district court also concluded that none of the models utilized were sufficiently predictive in terms of outcome to support an inference of discrimination. McCleskey v. Zant, supra, 580 F. Supp. at 361.

A further problem pointed out in the data is the problem of multicollinearity. Multicollinearity results when variables in an analysis are specifically correlated with one another. This creates difficulties in interpreting the coefficients of different variables. A relationship between the variables distorts the regression coefficients. A significant fact in the instant case is that white victim cases tend to be more aggravated while black cases tend to be more mitigated. Thus,

aggravating factors tend to be correlated with white victim cases while mitigating factors tend to be correlated with black victim cases. Every expert who testified, with the exception of Dr. Berk, agreed that there was substantial multicollinearity in the data. As noted by the district court, "the presence of multicollinearity substantially diminishes the weight to be accorded to the circumstantial statistical evidence of racial disparity." McCleskey v. Zant, supra, 580 F. Supp. at 364. (Emphasis in original).

Respondent submits that any analysis of these statistics in the case or the statistical results produced have to be considered in light of the context of the above concerning the data base itself as well as other problems with the methodology. Pretermitting the question of whether statistics are appropriate in such cases, Respondent submits that the data base and methodology utilized in the instant case are clearly insufficient to be useful for the purpose of proving racial discrimination.

B. Use Of Statistics

Respondent consistently has taken issue with the use of statistics in social science research in the instant type of cases. Respondent submits that the Eleventh Circuit Court of Appeals followed the holdings of this Court and the other circuits in its analysis of the statistical evidence. As noted by that court, "[s]tatistical analysis is useful only to show facts. In evidentiary terms, statistical studies based on correlation are circumstantial evidence. They are not direct evidence." McCleskey v. Kemp, supra, 753 F.2d at 888, citing Teamsters v. United States, 431 U.S. 324, 340 (1977). Furthermore, the usefulness of statistics in any given case depends on what is attempted to be proved by statistics. Clearly, statistics are more useful in proving disperate impact than in proving the cause of that impact. Proving certain subjective factors such as intent and motivation limit the usefulness of statistical evidence.

The Eleventh Circuit conducted a thorough discussion of the usefulness of statistical evidence and the manner in which it had been received by this Court and other courts. The court noted that certain methodology was subject to misuse and must be employed with great care and further recognized the need for additional evidence even if the statistical evidence was strong. The court concluded that "[a]s in all circumstantial evidence cases, the inferences to be drawn from the statistics are for the factfinder, but the statistics are accepted to show the circumstances." Id. at 890. The court did not decline to consider statistics but simply placed the consideration of the statistics in the proper perspective in making its analysis.

C. Legal Analyses.

As noted previously, the Petitioner has raised two specific aspects in his claim pertaining to the application of the death penalty in Georgia. Petitioner initially relies on the cruel and unusual punishment provision of the Eighth Amendment to assert that the death penalty is applied arbitrarily and capriciously. Petitioner also challenges the application of the death penalty under the Equal Protection Clause of the Fourteenth Amendment. The district court did not make a specific analysis under the Eighth Amendment because the Petitioner had conceded before the district court that the issue was resolved adversely to the Petitioner in the Eleventh Circuit and former Fifth Circuit. Thus, the district court relied upon the prior holdings of the Fifth Circuit and the Eleventh Circuit and the concession of the Petitioner in not addressing this claim. See Smith v. Balkcom, 660 F.2d 573, 584 (5th Cir. Unit B 1981); Spinkellink v. Wainright, 578 F.2d 582 (5th Cir. 1978). The Eleventh Circuit conducted a thorough analysis of both the Eighth Amendment and the Fourteenth Amendment claims.

The Eleventh Circuit concluded that Spinkellink could not be read to automatically foreclose an Eighth Amendment

challenge. The court noted this Court's holding in Godfrey v. Georgia, 446 U.S. 420 (1980), which was based on an Eighth Amendment challenge to a death sentence imposed in the state of Georgia. The Eleventh Circuit also recognized that in an Eighth Amendment claim such as the precise one presented in the instant case, there is an evitable connection between the Eighth Amendment claim and the Fourteenth Amendment Equal Protection claim. "A successful Eighth Amendment challenge would require proof that the race factor was operating in the system in such a pervasive manner that it could fairly be said that the system was irrational, arbitrary and capricious." McCleskey v. Kemp, supra at 891. The court recognized that due process claims and cruel and unusual punishment claims do not usually focus on intent, but where racial discrimination is claimed specifically on the basis of decisions made within a particular process, "then purpose, intent and motive are a natural component of the proof that discrimination actually occured." Id. at 892.

Petitioner asserts that the holding by the Eleventh Circuit relating to the Eighth Amendment is in conflict with this Court's prior holdings. Respondent knows of no holding by this Court specifically setting forth a standard to be applied in descrimination claims of an Eighth Amendment context.

In Godfrey v. Georgia, 446 U.S. 426 (1980), this Court held "if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." Id. at 428. The Court referred to the necessity of obviating standardless sentencing discretion. In making the analysis, the Court referred back to the decision in Gregg v. Georgia, 428 U.S. 153 (1976). Other cases making an Eighth Amendment analysis, such as Enmund v. Florida, supra, deal with a proportionality review of the specific case at hand in relation to the facts of that case. The cases focus on the determination of whether the sentence is arbitrary and capricious.

In making a determination as to whether the sentence in the instant case is arbitrary and capricious in light of a challenge that the decision was based on race, there naturally must be a focus on the decision-makers themselves. There is no challenge that the statutory scheme itself creates any arbitrariness and capriciousness, but rather that the individuals involved in the process rely upon an impermissible factor in making the decision. Thus, whether the challenge is under the Eighth Amendment or the Fourteenth Amendment, intent and motivation of those individuals involved must, by necessity, be a focus of the Court.

This Court has long recognized that "a statute otherwise neutral on its face, must not be applied so as to invidiously discriminate on the basis of race." Washington v. Davis, 426 U.S. 229, 241 (1976), citing Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). In making a challenge to an action that is discriminatory, however, the challenge must go further than simply identifying a disperate impact. There must be proof that the challenged action was a product of discriminatory intent. Village of Arlington Heights v. Metropolitan Housing Development Corp, 429 U.S. 252, 265 (1977); Washington v. Davis, supra at 240-242. In Village of Arlington Heights, this Court recognized that it must be established that the challenged decision was at least motivated by a descriminatory purpose. Id. at 266. In Washington v. Davis, this Court noted "the central purpose of the equal protection clause of the Fourteenth Amendment is for prevention of official conduct descriminating on the basis of race. Our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disporportionate impact." Id. at 326.

This Court is also recognized that an invidious discriminatory purpose could be inferred from the totality of the relevant facts; however the Court held the following:

> Nevertheless, we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule . . . that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.

Washington v. Davis, supra at 242. This Court again reiterrated in Village of Arlington Heights, supra, that "official action will not be held unconstitutional solely because it results in a racially disporportionate impact." Id. at 165. The Court specifically held that "proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." Id.

Justice Powell of this Court has also commented on the proffer of the Baldus study and another case writing a dissent from a stay of execution:

> The Baldus study, relied upon by Stephens, has not been presented to us. It was made in 1980 and apparently has been available since 1982. Although characterized by the judges of the Court of Appeals who dissented from the denial of rehearing en banc, as a "particularized statistical study" claimed to show "intentional race discrimination," no one has suggested that the study focused

> on this case. A "particularized" showing would require--as I understand it -- that there was intentional race discrimination in indicting, trying and convicting Stephens, and persumably in the state appellate and state collateral review that several times followed the trial. If the Baldus study is similar to the several studies filed with us in Sullivan v. Wainright, 464 U.S. 109, 104 S.Ct. 450, 78 L.Ed.2d 210 (1983), the statistics in studies of this kind, many of which date as far back as 1948, are merely general statistical surveys that are hardly particularized with respect to any alleged "intentional" racial discrimination. Surely, no contention can be made that the entire Georgia judicial system, at all levels, operates to discriminate in all cases. Arguments to this effect may have been directed to the type of statute addressed in Furman v. Georgia, 408 U.S. 238 [92 S.Ct. 2726, 33 L.Ed.2d 346] (1972). As our subsequent cases made clear, such arguments can not be taken seriously under statutes approved in Gregg.

Stephens v. Kemp, 464 U.S. 1027, 1030 n.2 (1984) (Powell, J., dissenting).

From this case and other cases, the Eleventh Circuit concluded that "generalized statistical studies" would be of little use in deciding whether a particular defendant was unconstitutionally sentenced to death. "As to whether the system can survive constitutional attack, statistical studies at most are probative of how much disparity is present, but it is a legal question as to how much disparity is required before

a federal court will accept it as evidence of the constitutional flaws in the system." McCleskey v. Kemp, supra at 893. The court noted that general statistical studies of the kind submitted in the instant case do not even purport to prove that a particular defendant was discriminated against because of his race. "To the extent there is a subjective or judgemental component to the discretion with which a sentence is invested, not only will no two defendants be seen identical by the sentencers, but no two sentencers will see a single case precisely the same." Id. at 894.

Under this reasoning, Respondent submits that the study in the instance case too general to support any conclusions of descrimination or arbitrariness in the application of the death sentence. Certain rational and neutral variables have not been taken into account, subjective factors have not been taken into account and a statistical study of this nature can simply not support a finding of intentional discrimination.

D. Sufficiency of the Study Presented.

Even if generalized studies of the type presented in the instant case are considered in making determinations as to inferences of discrimination, Respondent submits that the study does not support any such conclusion. The Eleventh Circuit held that "even if the statistical results are accepted as valid, the evidence fails to challenge successfully the constitutionality of the Georgia system." McCleskey v. Kemp, 753 F.2d at 894. The court specifically held that based on this decision that it was not necessary to determine whether the district court was right or wrong in faulting the study. Id. The court went on to conclude that any decision that the results of the study justified relief would have to deal with the district court's findings as to the validity of the study itself, which the Court declined to do based on its legal conclusions.

The court then noted that "whether a disperate impact reflects an intent to discriminate is an ultimate fact which must be reviewed under the clearly erroneous standard." Id., citing Pullman-Standard v. Swint, 456 U.S. 273 (1982). Thus, the court concluded that there were two factual findings in the instant case, the first being the validity of the study itself and secondly the finding of the ultimate fact based upon the circumstantial evidence revealed by the study, if the study were deemed to be valid. The court pretermitted a review of the finding concerning the validity of the study itself and reviewed the finding of fact by the district court that the ultimate fact of intent to discriminate was not proven. The Eleventh Circuit concluded, properly, that this finding of fact was supported by the record.

This Court has defined the clearly erroneous standard, noting that a finding would be clearly erroneous "when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Company, 333 U.S. 364 (1948). In the instant case, the Eleventh Circuit Court of Appeals properly concluded that there was evidence to support the decision by the district court and properly concluded that after a review of the entire evidence, there was no indication that a mistake had been committed by the district court.

As noted by the Eleventh Circuit, the study did not purport to prove that the Petitioner was sentenced to death because of either his race or the race of his victim. The study only shows that under certain circumstances more blacks received the death penalty than whites. Respondent would continue to assert that Petitioner has failed to make adequate comparisons of cases such that "similar" cases are actually being compared.

The Eleventh Circuit Court of Appeals found the following in relation to its analysis of the statistics presented:

The statistics are also enlightening on the overall operation of the legitimate factors supporting the death sentence. The Baldus study revealed an essentially rational system, in which high aggravation cases were more likely to result in the death sentence than low aggravation cases. As one would expect in a rational system, factors such as torture and multiple victims greatly increased the likelihood of receiving the penalty.

There are important dimensions that the statistics cannot reveal. Baldus testified that the Georgia death penalty system is an extremely complicated process in which no single factor or group of factors determines the outcome of a given case. No single petitioner could, on the basis of these statistics alone, establish that he received the death sentence because, and only because, his victim was white. Even in the mid-range of cases, where the race-of-the-victim influence is said to be strong, legitimate factors justifying the penalty are, by the very definition of the mid-range, present in each case.

The statistics show there is a race-of-the-victim relationship with the imposition of the death sentence discernible in enough cases to be statistically significant in the system as a whole. The magnitude cannot be called determinative in any given case.

> The evidence in the Baldus study seems to support the death penalty system as one operating in a rational manner. Although no single factor, or combination of factors, will irrefutably lead to the death sentence in every case, the system in operation follows the pattern the legislature intended, which the Supreme Court found constitutional in Gregg, and sorts out cases according to levels of aggravation, as gauged by legitimate factors.

McCleskey v. Kemp, supra, 753 F.2d at 896-897.

The court recognized that in a discretionary system, there was bound to be some inprecision. This Court even recognized in Gregg v. Georgia, supra, that no sentencing system would be perfect. The Eleventh Circuit concluded that the Baldus study was insufficient to support a finding that racial factors played a role in the outcome sufficient to find that the system as a whole was arbitrary and capricious.

The court went on to note that the so called race of victim effect increased in the mid-range of cases and accepted the twenty percent figure of the Petitioner in making its analysis. The court concluded, "[h]is testimony leaves this Court unpersuaded that there is a rationally classified, well-defined class of cases in which it can be demonstrated that a race-of-the-victim effect is operating with a magnitute approximating twenty percent." McCleskey v. Kemp, supra at 898. This is based on the fact that Baldus did not define the so called mid-range of cases. The court also concluded, however, that one could not focus on an undefined mid-range of cases to find that an entire system as a whole operated unconstitutionally. "It is simply not satisfactory to say that the racial effect operates in 'close cases' and therefore that the death penalty would be set aside in 'close cases.' " Id.

The court concluded that the statistics alone were insufficient to show that the sentence was determined by the race of the victim or even if the race of the victim contributed to the imposition of the death penalty.

The Eleventh Circuit also focused on the fact that Petitioner presented virtually no additional evidence to support a conclusion that the race of the victim in any way motivated the jury to impose the death sentence. Petitioner has referred to the district court's denial of discovery as to certain aspects of this case. Petitioner ignores the fact that Petitioner sought to obtain discovery of evidence from the Respondent in this case which was not in the custody or control of the Respondent. The district court did not prohibit the Petitioner from introducing any such evidence. As a matter of fact, it was discussed during certain conferences with the court that the Petitioner contemplated presenting such "anecdotal" evidence and Repondent was prepared to rebut such evidence.

E. Conclusion.

Respondent submits that the Eleventh Circuit properly applied the law of this Court and of this circuit in determining that no Eighth Amendment or Fourteenth Amendment violation had been shown. The court properly concluded that even if the validity of the study was assumed, which Respondent asserts that it should not be, the study simply confirms rather than condemns the system. "The study showed no discrimination as to the race of the defendant. The marginal disparity based on the race of the victim tends to support the state's contention that the system is working far differently from the one which Furman condemned." Id. at 899. As Petitioner has not shown sufficiently that the holding by the Eleventh Circuit Court of Appeals was in conflict with the decisions of this Court or that there has been discrepancy in the circuits, Respondent submits that no basis for the granting for

certiorari exists based on the holding by the Eleventh Circuit Court of Appeals. Therefore, Respondent would urge this Court to deny certiorari as to this issue.

II. THERE WAS NO VIOLATION OF GIGLIO V. UNITED STATES IN THE INSTANT CASE.

In this case, the district court granted habeas corpus relief concluding that the jury was left with the impression that witness Offie Evans had been made no promises which would affect his credibility. The Eleventh Circuit Court of Appeals reversed, holding that there were no promises as contemplated by Giglio v. United States, 405 U.S. 150 (1972) and that if there had been a Giglio violation it would be harmless. Petitioner challenges this ruling by the Eleventh Circuit Court of Appeals.

At the trial of the instant case, the State presented numerous witnesses, including the co-defendant, Ben Wright, to testify concerning the circumstances of the crime. During the initial presentation of the State's case, Ben Wright testified as to various persons and their participation in the robbery and also specifically testified that the Petitioner stated that the Petitioner shot a police officer. During the rebuttal portion of the case, the State presented several witnesses, including Offie Gene Evans. Evans did not testify at any time during the trial except as a rebuttal witness. At the beginning of his testimony, the State brought out the fact that Evans was presently incarcerated in the federal penitentiary serving a six year sentence for forgery. The State also brought out the fact that Evans had been convicted in 1953 for burglary, 1955 for larceny, 1959 for carrying a concealed weapon, 1961 for burglary, 1962 for burglary and forgery and 1967 for theft.

During Evans' testimony, he stated that in July of 1978 he was incarcerated in the Fulton County jail. At that time he was charged with escape from a federal halfway house. Evans testified that the escape charge was still pending, but he hoped he would not be prosecuted. When asked by Mr. Parker,

the Assistant District Attorney, if Mr. Parker had made any promises to Evans, Evans stated he had not. Evans specifically testified that the federal authorities told him they were not going to charge him with escape.

Evans later testified that during his incarceration in Fulton County he talked with the Petitioner concerning the crime. The Petitioner told Evans that the Petitioner went and checked out the place to be robbed a few days before the crime. Evans also testified that the Petitioner told him, "but said after he [McCleskey] seen the police come in and he was heading towards the other three, what was in the court -- I mean in the place taking the robbery off, he said that he couldn't stand to see him go down there, and I think the police looked around and seen him and he said, 'halt,' or something, and he had to -- it was him or them one, and said that he had to shoot." (T. 870).

Evans also testified concerning a conversation with the Petitioner about a makeup kit and about the Petitioner being made up slightly with a makeup kit. Evans finally testified that the Petitioner told him, "It would have been the same thing if it had been a dozen of them, he would have had to try to shoot his way out." (T. 871).

On cross-examination, defense counsel emphasized Evans' criminal history and attempted to portray Evans as a professional criminal. Evans testified on cross-examination that he told the police about the conversations with the Petitioner because the deputy heard him talking. Counsel also cross-examined Evans concerning the makeup kit. Evans later testified on cross-examination that the deputy asked if Evans wanted the deputy to call homicide and would he tell them what he had been told. Evans agreed to this. Evans was then asked what he was expecting to get out of telling this to the authorities. Evans responded, "just like I had been talking to Ben and something like that." (T. 880). Defense counsel also pointed out that Evans was seeking to protect his own self

interest by testifying so that suspicion would not be thrown on him based on his acquaintance with Ben Wright. Defense counsel asked, "Now, were you attempting to get your escape charges altered or at least worked out, were you expecting your testimony to be helpful in that?" (T. 882). Evans responded, "I wasn't worried about the escape charge. I wouldn't have needed this for that charge, there wasn't no escape charge." (T. 882). Evans testified that the charges were still pending against him but that he did not want to get prosecuted for the offense.

The Petitioner called Offie Evans as a witness at the state habeas corpus proceeding. Evans testified that he had been brought to Fulton County jail in July of 1978 from the federal prison system on an escape charge. He testified that prior to the time of his testimony he talked with two Atlanta police officers named Harris and Dorsey. He said he did not remember all about the conversation he might have had with Dorsey. He also testified that he talked with Russell Parker from the Fulton County District Attorney's office prior to his testimony, and just explained to Mr. Parker the substance of his prior conversations with the Petitioner. He testified that the detective knew about the escape charges, but Evans did not tell Parker about the charges. (S.H.T. 119).

Evans testified that the federal authorities were not actually charging him for escape, but with breach of trust due to an incident in a halfway house. Evans stated that he "wasn't on the run." (S.H.T. 120). He also testifed that the charges were settled at the federal penitentiary by the committee. He testified, "I think it was in August when I went before the committee out there and they told me they were going to drop the charges." (S.H.T. 121). During further questioning, Evans testified that it was either the last part of August or around the first of September of 1978 when he was told by the officials at the federal penitentiary that they were going to drop the charges. In response to a question by

the court, Evans stated, "I wasn't promised nothing about -- I wasn't promised nothing by the D.A. but the Detective told me that he would -- he said he was going to do it himself, speak a word for me. That was what the Detective told me." (S.H.T. 122).

Assistant District Attorney Russell Parker testified for the state habeas corpus court by way of deposition. Mr. Parker testified that he did not recall Detective Dorsey having any role in developing the testimony of Evans. His only memory was that Detective Jowers, Detective Harris and Deputy Hamilton were involved. (Parker deposition at 9). He also testified that he was unaware of any understanding between Evans and any Atlanta Police Department Detective concerning any favorable recommendation as to his federal escape charge at the time of the trial. Id. Mr. Parker testified that he was not aware of any understanding, even as of the date of the deposition on February 16, 1981, that might have existed between any Atlanta Police Department Detective and Offie Evans. Mr. Parker testified that he apparently later talked to someone with the F.B.I. to discover whether or not Evans would be prosecuted and ascertained that he probably would not. He never asked anyone to drop a charge and he did not know of Offie Evans ever asking anyone to try and get charges dropped.

The state habeas corpus court determined that it could not conclude that an agreement existed "merely because of the subsequent disposition of the criminal charges against a witness for the State." (State habeas corpus order at 8). The court also relied upon the fact that any comment was at most a communication strictly between a detective and the witness which was not communicated to Mr. Parker.

In reviewing this allegation, it is essential to examine the underlying purposes behind the various doctrines utilized in this area. In Alcorta v. Texas, 355 U.S. 28 (1957), this Court examined a case in which an eyewitness which testified at trial later made a sworn statement that he gave false testimony

at trial. The witness specifically stated that he told the prosecutor about the information prior to trial, but the prosecutor told him not to volunteer any information. The prosecutor admitted being aware of this information. This Court concluded that the testimony was seriously prejudicial and that it was the only evidence available to refute the defense presented.

Subsequently, in Napue v. Illinois, 360 U.S. 264 (1959), the principal state's witness testified at trial that no promises had been made for his testimony. It later developed that the witness had been made promises and the attorney did not correct the testimony at trial. The jury was simply told that a public defender would do what he could on behalf of the witness. The Court was faced with a situation in which the State failed to correct known false testimony. This Court focused on the extremely important nature of the testimony because of the fact that the passage of time and a dim light at the scene of the crime made any eyewitness identification very difficult and some of the pertinent witnesses for the State had left the State. The court noted that the evidence presented was largely the testimony of this particular witness. The Court went on to conclude that a conviction obtained through the use of known false testimony violated the Fourteenth Amendment to the United States Constitution. This would apply in situations in which the prosecutor either solicited the testimony or allowed it to go uncorrected. The Court noted that the rule did not cease to apply merely because the testimony only went to the credibility of the witness. The Court noted that in Napue there clearly was testimony at trial that no one offered to help the witness outside of an unidentified lawyer in the public defender's office who held a considerably different position from the prosecutor who had actually made the offer.

In Giglio v. United States, 405 U.S. 150 (1972), this Court examined a case in which the witness in question was a

co-conspirator and was the only witness linking the defendant with the crime. The government's attorney stated that there had been no promises. In the case one assistant attorney had made a promise that if the witness testified before the grand jury and at trial he would not be prosecuted. That assistant did not try the case. The Court referred to the decision in Napue, supra and noted that when the reliability of a given witness could well be determinative of guilt or innocence, non-disclosure of evidence which would affect the credibility of that witness fell within the rule of Brady v. Maryland requiring disclosure of the information. The Court noted that the rule would not apply if the information was only possibly helpful, but not likely to have changed the verdict. Napue, supra at 269. The Court in Giglio v. United States focused on the holding of Napue that a new trial would be required if the false testimony could in any reasonable likelihood have affected the judgment of the jury. In Giglio, the Court noted that without the testimony of that witness, there would have been no indictment and no evidence to carry to the jury; therefore, a new trial was required.

In each of the cases cited, the witness in question was a key witness in the case. In Alcorta v. Texas, the witness in question gave the only evidence to refute the defense presented. In Napue v. Illinois, supra, the testimony of the witness was noted as being extremely important as the witness provided the large part of the testimony at trial and made a critical identification of the defendant as a participant in the crime. In Giglio v. Illinois, the Court noted that without the testimony of the witness in question, there very likely would have been no indictment and no evidence to carry to the jury.

Respondent submits that there has never been a factual finding that anyone made any promise to Offie Evans. The state habeas corpus court simply stated that as a matter of law, even assuming Evans was telling the truth, there was no Giglio

violation. Respondent further asserts that this mere statement that a detective would "speak a word" for him is insufficient to constitute a deal under the holdings in Napue and Giglio. The Eleventh Circuit properly applied the holdings in Napue and Giglio in finding "the detective's promise to speak a word falls far short of the understandings reached in Giglio and Napue." McCleskey v. Kemp, supra at 884. The court went on to properly find that the statement of the detective, even if made, "offered such a marginal benefit, as indicated by Evans, that it is doubtful it would motivate a reluctant witness, or that disclosure of the statement would have had any effect on his credibility." Id. Thus, Respondent submits that the Eleventh Circuit Court of Appeals properly concluded that there was no due process violation.

In the instant case, the witness in question was not a key prosecution witness, but simply a rebuttal witness called to corroborate other testimony. The co-conspirator had already testified concerning the fact that the Petitioner stated that he shot the victim. The Petitioner did not raise a defense of lack of malice, but asserted that he did not commit the act at all. No defense was ever urged concerning a lack of malice; therefore, the testimony of this witness was not critical in this regard. Furthermore, there was other testimony from another witness that the Petitioner committed the crime in question and fired the fatal shot. Thus, there is a lack of materiality that was present in the cases of Giglio and Napue. Thus, Respondent submits that this is sufficient in itself to conclude that there was no due process violation. In considering the purpose behind Giglio and subsequent decisions, it is clear that the basis for these opinions was so the jury would know facts that might motivate a witness in giving certain testimony so that the jury might properly assess a witness' credibility. See Smith v. Kemp, 715 F.2d 1459, 1467 (11th Cir.), cert. denied, ___ U.S. ___, 104 S.Ct. 510 (1983). The Eleventh Circuit correctly concluded that any so-called

offer by the detective was so marginal as to make it highly ulikely that it would motivate a reluctant witness in any fashion or that the disclosure this one statement would have had any effect on the credibility of the witness.

Furthermore, the Eleventh Circuit Court of Appeals properly concluded that even if there had been a violation of Giglio, supra, any such error was harmless beyond a reasonable doubt. The court properly concluded that there was no "reasonable likelihood" that this statement would have affected the judgment of the jury. McCleskey v. Kemp, supra at 884. There was substantial impeaching evidence concerning the credibility of Evans without this one minor statement. The prosecutor set forth all of Evans' prior convictions and Evans was subject to rigorous cross-examination by counsel for the Petitioner. "Evans also admitted that he was testifying to protect himself and one of McCleskey's codefendants. In light of this substantial impeachment evidence, we find it unlikely that the undisclosed information would have affected the jury's assessment of Evans' credibility." Id. Thus, it is clear that any violation of Giglio was harmless beyond a reasonable doubt.

Contrary to the assertion of the Petitioner, the testimony of Evans was not crucial. The testimony of the co-defendant, Ben Wright, was sufficiently corroborated under Georgia law without the testimony of this witness. Under Georgia law, there need not be corroboration in every material detail. See Blalock v. State, 250 Ga. 441, 298 S.E.2d 477 (1983). The testimony of Ben Wright was corroborated by Petitioner's own confession without the necessity of Evans' testimony. Any comments by Evans concerning the use of makeup and McCleskey's intent were not sufficient to conclude that it could "in any reasonable likelihood have affected the judgment of the jury." Giglio, supra, 405 U.S. at 154. The testimony by Evans was not the only evidence concerning malice presented at trial. The prosecutor argued that the physical evidence showed malicious intent, asserting that the evidence indicated the police

officer had been shot a second time as he lay dying on the floor. The prosecutor also argued that the only choice left to Petitioner was to surrender or kill the police officer and that the fact that he chose to kill indicated malice. The prosecutor finally argued that Petitioner's statement to Evans that he would have shot his way out if there had been twelve officers also showed malice. Petitioner never attempted to rebut the evidence of malice and did not present a defense of lack of malice. Thus, this evidence was still not crucial to the State's case.

Based on all of the above and foregoing, Respondent submits that the Eleventh Circuit Court of Appeals properly applied the holdings of this Court in determining that there was no due process violation, or if there were any such violation, it was harmless beyond a reasonable doubt. Therefore, this Court should decline to grant certiorari on this issue.

III. ELEVENTH CIRCUIT COURT OF APPEALS PROPERLY CONCLUDED THAT ANY ALLEGED BURDEN-SHIFTING CHARGE WAS HARMLESS BEYOND A REASONABLE DOUBT.

Petitioner asserts this Court should grant certiorari to consider whether the Eleventh Circuit Court of Appeals improperly found that the charge in the instant case, if burden-shifting, was harmless beyond a reasonable doubt. The Eleventh Circuit concluded that the charge challenged was virtually identical to that found unconstitutional by that court in Franklin v. Francis, 720 F.2d 1206 (11th Cir. 1983). Which finding was affirmed by this Court in Francis v. Franklin, ___ U.S. ___, 105 S. Ct. 1965 (1985). The Eleventh Circuit Court of Appeals concluded that under its holdings, there were still two standards for ascertaining whether a burden-shifting charge could be harmless error under the standards of Chapman v. California, 386 U.S. 18 (1967). The Eleventh Circuit has found unconstitutionally burden-shifting instructions harmless when the evidence of guilt was so overwhelming that the error could not have contributed to the jury's decision to convict. Lamb v. Jernigan, 683 F.2d 1332 (11th Cir. 1982), cert. denied, 460 U.S. 1024 (1983). This was the basis for the finding of harmless error by the district court in the instant case. The Eleventh Circuit recognized that at least four members of this Court indicated that this particular test might be inappropriate in a Sandstrom analysis. Connecticut v. Johnson, 460 U.S. 73, 85-87 (1983).

The second test utilized by the Eleventh Circuit is where the instruction shifts the burden on an element that is not at issue at trial. Lamb, supra, 683 F.2d at 1342. Even the plurality in Connecticut v. Johnson indicated that this type of harmless error might be endorsed in certain limited circumstances:

> [A] Sandstrom error may be harmless if the defendant conceded the issue of intent .... In presenting a defense such as alibi, insanity, or self-defense, a defendant may in some cases admit that the act alleged by the prosecution was intentional, thereby sufficiently reducing the likelihood that the jury applied the erroneous instruction as to permit the appellate court to consider the error harmless.

Connecticut v. Johnson, supra, 460 U.S. at 87. This is the type of analysis applied by the Eleventh Circuit in finding harmless error in the instant case.

The Eleventh Circuit concluded that Petitioner did not simply rely upon the state's burden of proving each element of the crime beyond a reasonable doubt. The Eleventh Circuit concluded the following with regard to the defense asserted by the Petitioner:

> Rather, he took the stand at trial and testified that he was not a participant in the Dixie Furniture Store robbery which resulted in the killing of Officer Schlatt .... In closing argument, McCleskey's attorney again stressed his client's alibi defense. He concentrated on undermining the credibility of the eyewitness identifications that penpointed McCleskey as the triggerman and unquestioning the motives of the other robbery participants who testified that McCleskey had fired the fatal shots .... Although McCleskey's attorney's arguments were consistent with the alibi testimony offered by McCleskey himself, the jury chose

> to disbelieve that testimony and relied instead on the testimony of eyeswitnesses and other participants in the robbery.

McCleskey v. Kemp, supra, 753 F.2d at 903-904. The court thus concluded that by virtue of asserting the alibi defense, the Petitioner effectively conceded the issue of intent, although not explicitly conceding the issue of intent. The court did not conclude that a defense of alibi would automatically render a Sandstrom violation harmless, but concluded that "where the State has presented overwhelming evidence of an intentional killing and where the defendant raises a defense of non-participation in the crime rather than lack of mens rea, a Sandstrom violation on the intent instruction such as the one at issue here is harmless beyond a reasonable doubt." Id., citing Engle v. Koehler, 707 F.2d 241, 246 (6th Cir. 1983), aff'd by an equally divided court, ___ U.S. ___, 104 S. Ct. 1673 (1984) (per curiam).

Respondent submits that this analysis by the Eleventh Circuit falls squarely within that concluded to be permissible by the dessenters in Connecticut v. Johnson and at least indicated to be permissible by the plurality in Connecticut v. Johnson. As intent was effectively not an issue in the case for the jury to decide, it is clear that the charge was harmless beyond a reasonable doubt. Therefore, Respondent would urge this Court to decline to grant certiorari on this ground.

IV. THE ELEVENTH CIRCUIT COURT OF APPEALS PROPERLY DENIED RELIEF ON PETITIONER'S ASSERTION THAT THE JURY WAS IMPERMISSIBLY QUALIFIED AS TO CAPITAL PUNISHMENT.

Petitioner has asserted that this Court should grant certiorari on the question of whether the exclusion for cause of prospective jurors based on their opposition to the death penalty at the guilt phase is impermissible Petitioner's cites to the differing holdings in Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985) (en banc) and Keeten v. Garrison, 742 F.2d 129 (4th Cir. 1984).

The Eleventh Circuit Court of Appeals declined to grant relief on this issue holding, "because both jurors indicated they would not under any circumstances consider imposing the death penalty, they were properly excluded ..... Their exclusion did not violate Petitioner's Sixth Amendment rights to an impartial community representative jury." McCleskey v. Kemp, supra, 753 F.2d at 901. The court relied upon the holdings of the former Fifth Circuit Court of Appeals in making this conclusion. Smith v. Balkcom, 660 F.2d 573, 582-83 (5th Cir. Unit B 1981), cert. denied, 459 U.S. 882 (1982); Spinkellink v. Wainwright, 578 F.2d 582, 593-94 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979).

The reasoning in Spinkellink, supra, is still applicable in the instant case. In that case, the former Fifth Circuit assumed that a death-qualified jury would be more likely to convict than a non-qualified jury for purposes of its analysis. The court then went on to note that this still did not demonstrate which jury would be impartial. The court concluded that a review of the voir dire examination demonstrated that the venire that had been chosen in no way indicated a bias either for the prosecution or a bias against

the defendant. "The venireman indicated only that they would be willing to perform their civic obligation as jurors and obey the law. Such persons cannot accurately be branded as prosecution-prone." Spinkellink, supra, 578 F.2d at 594. The court recognized the state also enjoyed the right to an impartial jury even as did the defendant and "impartiality requires not only freedom from jury bias against the accused and for the prosecution, but freedom from jury bias for the accused and against the prosecution." Id. at 596. The court concluded that to call a jury which had been death-qualified prosecution-prone would be to misunderstand the meaning of impartiality. Id. at 596.

The court also denied the defendant's assertion that qualifiying the jury in this manner violated the Sixth Amendment's provision for a representative cross-section of the community. The court even assumed that this could be shown to be a distinctive class, but went on to find the state had "weightier reasons" as required in Taylor v. Louisianna, 419 U.S. 522 (1975), for the exclusion of such veniremen.

Respondent submits that this holding by the Eleventh Circuit and former Fifth Circuit Court of Appeals clearly complies with the constitutional mandates of this Court. The so called death-qualification of the jury is simply an attempt to seat an impartial jury, that is, a jury which is neither biased for the prosecution nor for the defendant. This Court has again recently recognized the state's right to exclude jurors for cause based on their opinions as to the death penalty. "Exclusion of jurors opposed to capital punishment began with a recognition that certain of those jurors might frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths." Wainright v. Witt, ___ U.S. ___, 105 S. Ct. 844, 851 (1985). The decisions discussing the excusal as such jurors are all focused on the concept of an impartial jury, that is, jurors who will "conscientiously apply the law and

find the facts." Id., 105 S. Ct. at 852. The State may legitimately excuse such jurors both at the sentencing phase and at the guilt-innocence phase based on the assumption that the juror's attitudes toward the death penalty could easily affect his view on guilt-innocence. Furthermore, to require the state to conduct two seperate trials, in effect, clearly exceeds constitutional mandates. In order to seat a second jury for a sentencing proceeding, as contemplated by the Eighth Circuit Court of Appeals, the State would have to retry the defendant by presenting all evidence at the second proceeding so that the second jury could be in the same position as the first jury in order to appropriately determine the sentence. Clearly, this is not constitutionally required.

Respondent therefore submits that this allegation presents no ground for review by this Court and would urge this Court to deny certiorari on this ground.

CONCLUSION

For all of the above and foregoing reasons, Respondent respectfully requests that this Court deny the petition for a writ of certiorari filed on behalf of the Petitioner, Warren McCleskey.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, MARY BETH WESTMORELAND, a member of the bar of the Supreme Court of the United States and counsel of record for the Respondent, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this brief in opposition for Respondent upon the Petitioner by depositing copies of same in the United States mail with proper address and adequate postage to:

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